Supreme Court, U. S.
FILED
OCT 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-368

JOE I. TORRES,
Petitioner,

vs.

THE PEOPLE OF THE
STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF COLORADO

BRIEF IN OPPOSITION

J. D. MacFARLANE
Attorney General of Colorado

JEAN E. DUBOFSKY
Deputy Attorney General

EDWARD G. DONOVAN
Solicitor General

MARY J. MULLARKEY
First Assistant Attorney General

J. STEPHEN PHILLIPS
Assistant Attorney General

Appellate Section

104 State Capitol
Denver, Colorado 80203
Attorneys for Respondent

INDEX

Page

INTRODUCTORY STATEMENT 1

QUESTION PRESENTED 1

STATEMENT OF THE CASE..... 2

ARGUMENT 7

CONCLUSION 9

CASES

Page

California v. Green, 399 U.S. 149 (1970)..... 7

Dutton v. Evans, 400 U.S. 74 (1970)..... 7, 8, 9

Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229 (1917)..... 8

Holland v. United States, 348 U.S. 121 (1954)..... 7

Krulewitch v. United States, 336 U.S. 440 (1949)..... 8

People v. Braly, 532 P.2d 325 (Colo. 1975)..... 7

People v. Schlepp, 518 P.2d 824 (Colo. 1974)..... 7

People v. Torres, 536 P.2d 868 (Colo. App. 1975)..... 7

United States v. Baxter, 492 F.2d 150 (9th Cir. 1973).. 9

United States v. Talbot, 470 F.2d 158 (6th Cir. 1972).. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-368

JOE I. TORRES,
Petitioner,

vs.

THE PEOPLE OF THE
STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF COLORADO

BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

The respondent accepts the petitioner's references and statement as to jurisdiction and the constitutional provisions involved. However, the factual context of this case mandates a restatement of the question presented.

QUESTION PRESENTED

Does the Federal Constitution absolutely prohibit the hearsay evidentiary use of a coconspirator's notes and records of fraudulent transactions, made during the pendency of a conspiracy, when there is abundant and independent circumstantial evidence of the defendant's guilt of conspiracy and theft?

STATEMENT OF THE CASE

The petitioner, at the time of the offense, was the sheriff of Pueblo County, Colorado. At the time of his ascendency to office, he elected to continue purchasing all petroleum products from John Tucci, president and operator of the Main Oil Company. During the year 1970, it became patently obvious that Main Oil Company was defrauding Pueblo County by continually billing, and receiving payment for, petroleum products that were charged to the Sheriff's Department account, but were never delivered.

The prosecution introduced Pueblo County documents which established monetary payments made by the County to the Main Oil Company from May 28, 1970, until February 11, 1971. The Pueblo County clerk authenticated these documents and explained that they each contained a cancelled warrant from the County to Main Oil, a requisition for payment from the Sheriff's Department to the County Commissioners, and invoices reflecting each delivery. It was from scrutiny of these invoices and from scrutiny of the operational needs of the Sheriff's office (revealed from other evidence) that extensive overbillings were revealed. Primarily, these records showed grossly disproportionate gasoline deliveries to the main dispensing gasoline tank used by the Sheriff's Department in downtown Pueblo. They also showed impossibly high deliveries to an auxiliary tank used by a single sheriff's deputy in Boone, Colorado.

As to the main tank, the Pueblo County records showed that over 7,000 gallons of gasoline were billed to the Sheriff's Department during May of 1970. The records revealed that this was 2,500 gallons more than the average used during the immediately preceding and following months. This was also four times the amount delivered in

August of the same year when, coincidentally, a Pueblo newspaper article reported the preceding months' disparate and exceedingly high usage. It was independently established (and the petitioner admitted) that the same number of vehicles (usually six) had access to this pump during this block of time and that gasoline usage would be fairly constant. When asked for an explanation of the unusually high May deliveries on cross-examination, the petitioner conceded that the County was charged for gasoline that was not in fact delivered.

The falsification of billings relating to the subsidiary tank in Boone, Colorado, was even more obvious and detectable. The tank was exclusively used by a single Pueblo County Sheriff's deputy. His testimony revealed that he would use about 450 gallons of gasoline a month. Since the tank held 500 gallons, he would order it filled about once each month. The Pueblo County records revealed, however, that the County was billed, and paid for, four deliveries of 800 gallons and one delivery of 700 gallons between July and November of 1970. That tank could not hold these amounts. The Pueblo County records also revealed that the County was billed, and paid Main Oil, for 1,900 gallons of gas, delivered to the Boone tank over a two-and-one-half-month period — October 9, 1970 to December 18, 1970. The deputy's testimony was that an appropriate usage for that period would be nearer 1,200 gallons.

The evidence that the overbilling scheme was the result of a criminal conspiracy between Tucci and Torres, although circumstantial, was abundant. An employee of the Main Oil Company testified that normally all credit delivery invoices for customers of the company would be placed in the cash box daily by an individual making the delivery. They would then be posted on the respective ledger account the following day. However, all delivery

invoices to the Sheriff's Department would be handled exclusively by John Tucci, although he made none of the deliveries. Not infrequently, this employee observed several such invoices on Tucci's desk made out to the Sheriff's Department account. These invoices were unsigned. However, at some later date these invoices would reappear for late posting on the ledger account bearing Joe Torres' signature. Torres admitted the signatures were genuine. Thus, the inference was inescapable that Tucci personally and surreptitiously delivered these invoices to Torres for the latter's signature. Most of these invoices were concededly fraudulent.

However, this was not Torres' major contribution to the fraud. The Pueblo County clerk testified that the County would not pay any of these overbillings absent a requisition to do so by the Sheriff's Department. All the requisitions for payment of these fraudulent overbillings were personally verified as legitimately due by Torres. Most of the individual invoices reflecting deliveries of gasoline, also contained in the Pueblo County records, were personally receipted by Torres. Seven of the nine invoices relating to the Boone, Colorado, "deliveries" were receipted by Torres. One other is signed by "JT." Six of the eight invoices of the gasoline and miscellaneous petroleum products "delivered" to the main Sheriff's office bore Torres' signature. Without this continuing assistance, the bills never would have been paid.

Torres admitted signing these documents and admitted that Tucci bilked the Sheriff's Department. Although Torres testified that his participation was unwitting, the evidence belied Torres' assertion of innocence.

As to the grossly inflated, and admittedly fraudulently billed, deliveries in May of 1970 to the tank located in downtown Pueblo, Torres asserted mere oversight. Yet he

testified that he knew the number of vehicles being serviced by that tank, he knew the appproximate mileage these vehicles got, and he knew that the use was constant from month to month. His continuing assertion that he innocently authorized inflated payments was also significantly controverted by his admission that he had been checking gasoline usage from that tank immediately preceding this period of time because he suspected unauthorized usage of the gasoline by the County Commissioners and by the County Clerk. Torres also acknowledged adverse newspaper publicity concerning the excessive gasoline usage during the latter part of July 1970. Suspiciously and coincidentally, billings for gasoline deliveries immediately dropped during the month of August to approximately one-fourth of that supposedly used in May. Yet the need for gasoline remained constant throughout these months.

There was also compelling evidence discrediting Torres' claim that he innocently erred each time he signed an invoice reflecting a patently impossible delivery of gasoline to the tank in Boone, Colorado, and each time he compounded such "error" by signing a requisition for payment for an inflated amount. Torres established the auxiliary tank in Boone. He admitted that he generally knew the amount of gasoline the deputy there had used. He also failed to deny that he had previously told a Colorado Bureau of Investigation agent that he knew that the tank in Boone held only 500 gallons. Instead, he merely claimed that he couldn't remember that conversation. Armed with knowledge of the gasoline usage in Boone, and possibly armed with knowledge of the capacity of the tank he had ordered installed, Torres personally approved many deliveries in excess of that capacity and far in excess of the periodic usage. He also testified that he read all the tickets he signed. It is also significant that Torres did not allow the Boone station deputy to sign a receipt for

the Boone deliveries or keep records of what was delivered. All these facts circumstantially demonstrated that Torres knowingly assisted in defrauding Pueblo County.

The above cited evidence is totally independent of the notes and records, personally kept by John Tucci, the coconspirator. It is the evidentiary use of these notes and records upon which this petitioner claims error and predicates this petition for certiorari. These notes and records (which the Colorado Court of Appeals found were made during the course, and in furtherance, of the conspiracy), in the opinion of an expert witness, reflected the amounts of overbillings to Pueblo County. Since the overbillings would necessarily create an inventory overage, Tucci hid the surplusage by delivering like amounts for cash to a gas station he owned, pulling the invoice from the Main Oil Company books, and pocketing the cash. The disputed notes and records (including the invoices of the deliveries to the gas station) primarily reflected this procedure.

Tucci was not called as a witness, although the Colorado Court of Appeals, repeating the observation of the trial court, noted that he was available to the defense. Rather the exhibits themselves were introduced. An expert accountant collated and explained the accounting procedure employed.

The disputed evidence was used before Torres testified. It was primarily used to further demonstrate the existence of the fraud and Tucci's participation therein. Torres did not deny Tucci's guilt. However, the disputed records also included notations of disbursements of the excess cash resulting from these thefts. The disbursement column on one exhibit reflected three payments to "Tores" [*sic*] in November and December of 1970. Specifically, those three notations constitute the damaging

materials that the petitioner now argues should have been constitutionally suppressed.

ARGUMENT

Contrary to the petitioner's present assertion, the Colorado Court of Appeals found that the evidence, independent of the coconspirator's notes and records, although circumstantial, established the prima facie existence of the conspiracy and Torres' participation therein. *People v. Torres,* 536 P.2d 868, 871 (Colo. App. 1975); *cf. Holland v United States,* 348 U.S. 121 (1954). The above recited evidence, all of which is reflected in the reported opinion, verified this premise. The Colorado Court of Appeals then employed the existing Colorado rule that a coconspirator's "statements," made in furtherance of and during the conspiracy, are admissible as an exception to the hearsay rule if the conspiracy is first independently established. *People v. Braly,* 532 P.2d 325, 327 (Colo. 1975); *People v Schlepp,* 518 P.2d 824 (Colo. 1974).

The petitioner now asserts, as the single issue for review, that employment of the Colorado rule in these circumstances violates his Sixth Amendment right to confrontation which is made obligatory on the states by the Fourteenth Amendment.

The respondent disagrees. This Court's decision in *Dutton v. Evans,* 400 U.S. 74 (1970), is adversely dispositive of the argument the petitioner now advances. Citing *California v. Green,* 399 U.S. 149 (1970), this Court, in *Dutton,* noted first that the constitutional right to confrontation does not automatically preclude the evidentiary use of all forms of hearsay evidence. Rather, "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process . . . ." *Dutton v. Evans, supra* at 89. Thus the relevant inquiry in balancing hearsay evidence against the Confrontation

Clause is whether there are sufficient "indicia of reliability" of the particular hearsay offered so that the truth of the matter is not inherently suspect.

The present case does not involve a confession obtained by official interrogation; it does not involve prosecutorial misconduct resulting in a key witness being unavailable to the defense; nor does it involve the use of a paper transcript. It does not involve a joint trial or the wholesale denial of cross-examination. Indeed, the present petitioner was able to examine the notes and records here used and extensively cross-examine the expert accountant who collated and explained these exhibits. He was free to present evidence establishing a different interpretation (if one was logically possible) or to directly subpoena the source of the hearsay evidence. See *id.* at 88 n.19. He chose not to do so, and his inaction indicates the accuracy of the disputed evidence.

Unlike *Dutton,* this case does involve, however, application of the uniformly accepted coconspirator exception to the hearsay rule employed not only in Colorado but also in the federal courts. See *Krulewitch v. United States,* 336 U.S. 440 (1949); *United States v. Talbot,* 470 F.2d 158 (6th Cir. 1972). Since the fraudulent records here were made during the course, and in furtherance, of the conspiracy, were ultimately against the penal interest of the maker, and were allowed into evidence only after the prosecution had established by independent proof a concert of action between the petitioner and his coconspirator, the records have sufficient presumptive reliability to allow their evidentiary use without attendant confrontation. *Hitchman Coal and Coke Co. v. Mitchell,* 245 U.S. 229, 249 (1917). The independent-proof requirement is a substantive safeguard of the reliability of the coconspirator's "statement."

Furthermore, Tucci's "statements" were reduced to writing in the form of business records. As noted by Justice Harlan in his concurring opinion in *Dutton v. Evans, supra* at 95-96, the Confrontation Clause has never required the production of the maker of such records where, as here, the records are properly authenticated. This rule is a recognition that the necessary accuracy in a business endeavor insures the truth of the matters recorded. And "[t]he principles of efficient accounting apply just as readily to an illicit enterprise as they do in a licit business." *United States v. Baxter,* 492 F.2d 150, 164 (9th Cir. 1973).

Finally, as in *Dutton,* it should be observed that the source of the hearsay records, John Tucci, had personal knowledge of the matters he recorded. This was established by independent evidence and by the coconspirator's "guilty" plea in a separate proceeding (Appendix G of Petition). It was also tacitly admitted by the petitioner at his trial. Thus, it is inconceivable that cross-examination of Tucci would have revealed the latter's lack of knowledge of Torres' involvement or revealed a misrepresentation of the nature of that involvement. *Dutton v. Evans, supra* at 88-89. In fact, the contrary is true. All the factors that contribute to reliability found dispositive in *Dutton* are present here. Additionally, here the hearsay documents were made during the conspiracy, not after its completion. Here, the disputed evidence constituted business records, and the accuracy of the entries was necessary to perpetrate the fraud. And here, the petitioner, by testimony, admitted the primary conclusion offered by this evidence — that Tucci was defrauding the County of Pueblo.

CONCLUSION

Thus, the respondent respectfully submits that this petition for a writ of certiorari represents only the veiled hope

that this Court will hold that the Confrontation Clause prohibits the use of all hearsay evidence in a criminal trial. Because this evidence was admitted only after satisfactory bases to evaluate the truth of the matter presented were independently established, such a conclusion would be necessary to afford the petitioner the relief he requests. Accordingly, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. D. MacFARLANE
Attorney General of Colorado

JEAN E. DUBOFSKY
Deputy Attorney General

EDWARD G. DONOVAN
Solicitor General

MARY J. MULLARKEY
First Assistant Attorney General

J. STEPHEN PHILLIPS
Assistant Attorney General

Appellate Section

104 State Capitol
Denver, Colorado 80203
Attorneys for Respondent